

Ms. Worl expressed concern over the report of lack of compliance by some Federal agencies in the GAO report. Ms. Hutt stated, as noted in the GAO report, that Federal agencies have different rates of compliance. In November 2010, the National NAGPRA Program provided the Review Committee with a sample template of the data, broken down by Federal agency, which the program is seeking to obtain for the FY 2011 report. At the November 2011 meeting, after the Review Committee has a chance to review that information, the National NAGPRA Program would be happy to provide any additional information necessary. Ms. Hutt stated that the National NAGPRA Program does work closely with Federal agencies' NAGPRA representatives and encourages them to appear before the Review Committee to provide updates on their successes and barriers to implementation.

Discussion: Oversight Hearing on *Finding Our Way Home: Achieving the Policy Goals of NAGPRA* (June 16, 2011)

Ms. Hutt stated that on June 16, 2011, the Senate Indian Affairs Committee held an Oversight Hearing on *Finding Our Way Home: Achieving the Policy Goals of NAGPRA*, during which the issue of repatriation was discussed, including repatriation at the Smithsonian Institution. The hearing was chaired by Senator Akaka (D-HI), who was joined by Senators Udall (D-NM) and Murkowski (R-AK). Ms. Hutt stated that a recorded webcast of the hearing was available on the Senate Indian Affairs Committee website, in addition to the full written testimony of each presenter.

Three panels provided testimony. The first panel was Ms. Anu Mittal, Director, U.S. GAO, Natural Resources and Environment, who summarized the two GAO reports — *NAGPRA: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (No. GAO-10-768) and *Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects* (No. GAO-11-515). Ms. Hutt stated that the GAO summary contained updated statistics available on the National NAGPRA Program website. Responding to questions from Senator Murkowski, Ms. Mittal identified the following Federal agencies as best performers with 75 to 85 percent completion rates: the Department of Defense, U.S. Army Corps of Engineers; the Department of the Interior, National Park Service; and the Department of Agriculture, Forest Service. Although other factors came into consideration, the GAO noted each of the highlighted agencies had identified their collections, and has a centralized NAGPRA office, decision-making policies in place to enable successful tribal consultation, and the ability to move forward with determinations of cultural affiliation and notice publication.

The second panel was Ms. Peggy O'Dell, Deputy Director, NPS, and Mr. Kevin Gover, Director of the National Museum of the American Indian (NMAI). Ms. Hutt stated that Ms. Jacquetta Swift, NMAI, would present a summary of repatriation efforts at the NMAI at this Review Committee meeting. Ms. Hutt stated the NPS testimony summarized progress made in NAGPRA implementation, and this summary is contained in the National NAGPRA Program's FY 2011 Midyear Report to the Review Committee. Ms. Hutt stated that during her presentation, Ms. O'Dell summarized the grants activity within the National NAGPRA Program. Ms. Hutt explained that the National NAGPRA Program awards two types of grants: noncompetitive repatriation grants, which are awarded throughout the fiscal year; and competitive consultation/documentation grants, which are awarded in July. Repatriation grants cover repatriation expenses, including travel and ceremonies. The maximum repatriation grant amount is \$15,000. The number of consultation/documentation grants awarded depends upon the total grant funds available after repatriation grants are satisfied. The maximum consultation/documentation grant amount is \$90,000. During the hearing, Ms. O'Dell stated that the National NAGPRA Program has never denied a repatriation grant. Ms. Hutt reported that, while this statement is accurate, what may not have been clear during the hearing was the fact that repatriation grant requests have increased significantly over the past few years, while the amount of funding available for grants has remained the same. As a result, the funding of consultation/documentation grants has decreased. This year, the grants panel's recommended funding for consultation/documentation grants exceeded the funds available. Thus, some deserving consultation/documentation grant requests will not be funded. Ms. Hutt stated she hoped the National NAGPRA Program would have an opportunity during follow-up communications with the Senate Indian Affairs Committee to clearly explain the difference between the two types of grants and address the amount of funding requested through grant applications each year.

The third panel included The Honorable Mark Macarro, Chairman of the Pechanga Band of Luiseno Indians; The Honorable Mervin Wright, Jr., Vice-Chairman of the Pyramid Lake Paiute Tribe; and Mr. Ted Isham, Cultural

Preservation Manager and Tribal Historic Preservation Officer for the Muscogee (Creek) Nation. These individuals provided detailed comments on the experiences of those in Indian country in dealing with museums, universities and Federal agencies on NAGPRA compliance matters. Ms. Hutt recommended to the Review Committee and the audience that they read the written comments in full.

Mr. Wright, Jr., stated he felt the theme of the hearing, "*Finding Our Way Home: Achieving the Policy Goals of NAGPRA*", was a fitting one. Mr. Wright, Jr., stated that a lot of the issues and difficulties encountered in implementing NAGPRA have been discussed at the committee level. Mr. Wright, Jr., stated that, at the November 2010 meeting, he raised the point that after considering the database and status reports, it seems as though a number of collections are not being effectively repatriated. Mr. Wright, Jr., stated that consideration of the decision-making process in NAGPRA is important, and once that issue is addressed, difficulties being faced by tribes can hopefully be identified and addressed. Mr. Wright, Jr., summarized his testimony at the hearing. Congress had the right intention when it enacted a law to address the human right of Native Americans to have their ancestors treated with respect, including the right to be buried and stay buried. Mr. Wright, Jr., described his concerns with 43 C.F.R. 10.11; the need to amend the definition of Native American in the statute to include the phrase "or was"; and the need to specially protect burial grounds as sacred sites. Mr. Wright, Jr., stated that the hearing record would remain open for two more weeks, and he encouraged tribal leaders and others to submit their comments.

Ms. Worl stated that, regarding 43 C.F.R. 10.11, the Review Committee had recommended in their report to Congress that associated funerary objects be transferred together with human remains. In addition, the Review Committee has consistently supported amending the definition of Native American in the Act to include the phrase "or was" in numerous past reports to Congress.

Presentation: The GAO Report *Smithsonian Institution: Much Work Needed to Identify and Repatriate Indian Human Remains and Objects* (No. GAO-11-515)

Presentation

Ms. Jacquetta Swift, Repatriation Manager, National Museum of the American Indian (NMAI), thanked the Review Committee and National NAGPRA Program staff for the opportunity to speak, the Syracuse University College of Law for hosting the meeting, and the Haudenosaunee for the warm welcome. Ms. Swift stated that the Smithsonian Institution is not subject to NAGPRA. The repatriation efforts at the Smithsonian Institution are guided by the National Museum of the American Indian (NMAI) Act. The NMAI Act was the first piece of Federal legislation on repatriation, and impacted only the Smithsonian Institution's 19 museums, 3 research centers, and 1 national zoo. Of those, only two museums have collections that fall under the NMAI Act, the NMAI and the National Museum of Natural History (NMNH). Ms. Swift stated she would speak on behalf of the repatriation efforts at NMAI and provide an overview of the recent GAO report and recommendations regarding the Smithsonian Institution's repatriation efforts.

The GAO report on repatriation efforts at the Smithsonian Institution took 17 months to complete and was released on May 25, 2011. While the report acknowledged that tribes were generally satisfied with the Smithsonian Institution's repatriation program, the GAO made one recommendation to Congress and four recommendations to the Smithsonian Institution. Recommendation to Congress: The GAO recommended that Congress may wish to consider ways to expedite the Smithsonian Institution's repatriation process. Recommendations to the Smithsonian Institution: The GAO recommended that, one, the Smithsonian Institution's Repatriation Review Committee's jurisdiction be expanded to include the NMAI, and not just the NMNH; two, that the Smithsonian Institution report to Congress on its repatriation activities; three, that the Smithsonian Institution establish an independent appeals process; and four, that the Smithsonian Institution develop a policy for human remains and objects that cannot be culturally affiliated.

Ms. Swift stated that the Smithsonian is working on each of these recommendations. Regarding the fourth recommendation, the Smithsonian Institution would like to seek public input, and invites questions or comments from the Review Committee and others. Ms. Swift stated that the NMAI Act uses a reasonable basis standard for determining cultural affiliation, and not a preponderance standard. At the NMAI, the highest priority is the return of all human remains and associated funerary objects to their communities of origin, both nationally and internationally.

1 we were going to go ahead and defer that until
2 tomorrow morning. And earlier in the morning we
3 had also said that we would ask Mervin Wright to -
4 if he wanted to report on the Senate hearing, if he
5 had any comments he wanted to offer. So we will
6 turn it over to Merv.

7 For those of you who might not know, Mervin
8 Wright is the Vice Chair of the Paiute, and he was
9 invited to testify in that capacity before the
10 hearing.

11 **DISCUSSION: OVERSIGHT HEARING ON FINDING OUR WAY**
12 **HOME: ACHIEVING THE POLICY GOALS OF NAGPRA (JUNE**
13 **16, 2011)**

14 **MERVIN WRIGHT, JR.**

15 MERVIN WRIGHT, JR.: Thank you, Rosita. Well,
16 first, I want to say hello, a belated hello to the
17 rest of the committee members here. I had some - I
18 had my flight cancel yesterday in Chicago and was
19 able to get here this morning, so I'm grateful to
20 be here. It's good to participate once again with
21 the Review Committee. And our role with offering
22 the assistance and participating with different
23 activities directly related to the NAGPRA law,
24 yeah, I received a phone call from the Senate
25 Committee on Indian Affairs at the beginning of

1 June, I think it was June 2nd, stating that I was
2 going to be invited. And so I prepared my
3 testimony and I, you know, was a bit concerned with
4 my role here as a committee member, but it was
5 pretty clear from the Senate Committee Majority
6 Leader, Senator Harry Reid, is from Nevada, his
7 interest in wanting to hear my testimony, and the
8 committee staff basically told me that they wanted
9 me to be able to speak freely from a tribal
10 perspective with regard to the NAGPRA law and where
11 we're at.

12 And I thought that the theme was fitting,
13 *"Finding Our Way Home, Addressing Policy Goals of*
14 *NAGPRA."* And a lot of what, you know, what we've
15 discussed here at the committee level with the
16 staff reports and status reports of different
17 activities, there are certainly difficulties in
18 dealing with implementing the law. The last
19 meeting in November, face-to-face meeting we had,
20 one of the comments that I made was that, you know,
21 we have a law here with repatriation in the title,
22 and when you look at the database and the status
23 reports, it looks like we're not effectively
24 repatriating a number of the collections. And so,
25 you know, looking at the situation that we're

1 facing, the circumstances that are involved in the
2 proceedings, I mean just as it was said this
3 morning, you know, the decision-making process of
4 NAGPRA, you know, how are decisions being made.
5 And so as we start addressing that issue, I think a
6 lot of the - a lot of the difficulties that tribes
7 are having will probably be identified and, with
8 our hope, addressed with regard to making it
9 possible to start experiencing greater levels of
10 repatriation.

11 Going into - going into the testimony, you
12 know, the three primary concerns that I had as a
13 tribal leader was looking at how - Congress had the
14 right intention. They had - they had the right
15 idea of enacting a law that addresses our human
16 right as we look at it, you know, with respect to
17 treating our ancestors with respect. And we feel
18 today that we do have that human right to be buried
19 and to stay buried. And so, you know, with that
20 regard, you know, that was - that was the
21 foundation of my statement, and also to acknowledge
22 how our burial practices are conducted today, as
23 they were generations and generations ago. And
24 there is no difference between the way we conduct
25 what we call today our funerals. They're very -

1 they are communal, and everything that goes into
2 that burial belongs to that particular individual.
3 And so when we recognize the burials, our ancestral
4 burials, it's in that same regard. All of those
5 items, all of the things that are with that
6 particular individual has significant meaning as to
7 why it's present in that particular site.

8 We looked at - I talked about some of the
9 things that are going wrong with the law, from a
10 tribal perspective. And my testimony certainly is
11 available. I think it's online, I think, at the
12 website. I think all of the submitted testimony is
13 available.

14 I think one of the - the other part of our
15 foundation is that long ago, when our ancestors
16 were buried, put away, as some say - you know,
17 nobody, including the individual, ever left a will,
18 ever left anything to say that, hey, if somebody
19 wants to come dig me up later, you know, go ahead
20 and let them. Those things are not - you know,
21 they just - they were never thought of, and in a
22 lot of instances it was, you know, disallowed. And
23 so that's the way our traditions are based, you
24 know, with regard to how we treat our burials.

25 The rule - the 2010 rule on culturally

1 unidentified human remains is a serious concern,
2 especially where the rule separates the human
3 remains from the funerary objects and items, and
4 that rule has to be fixed. How it gets fixed is
5 amending it, reversing it, possibly repealing it,
6 whatever it takes, but it's a difficult thing to
7 have to deal with, as I just explained about our
8 burials and to see that, you know, there's a
9 separation that's going to occur with the funerary
10 items and objects with the actual individuals.

11 The technical amendment was another issue that
12 we brought up with regard to the definition of
13 Native American. This committee has, on occasion,
14 and the last time we did it was in October of 2009
15 where we reaffirmed our support for the amendment
16 to the definition of Native American. We call it
17 the 1776 law, or 1776 rule, after the decision in
18 the Kennewick case. So it's gone through three
19 sessions of Congress without success of being
20 enacted to amend the definition, and so I addressed
21 that issue.

22 And then the sacred sites, you know, we talked
23 about our burials. Sometimes it's discussed where
24 sacred sites are separated from burials and treated
25 on some different level. Well, in some cases,

1 that's allowable, but when it comes to our burials
2 and when it comes to sites of where our burials are
3 located, those are sacred sites. And so we're
4 looking for a right of action that tribes are going
5 to be allowed to bring court action to protect our
6 sacred sites, because right now we're the only
7 group of Americans in this country who do not have
8 a door to the courthouse to protect our sacred
9 sites.

10 And so we're just looking at it, you know,
11 from the standpoint of even looking at the First
12 Amendment, you know, freedom of speech, and we see
13 how those rights of American citizens are
14 protected. And we're having such difficulty with
15 our burials and protecting our burials and to
16 repatriate our burials. So along those lines I
17 think that I was trying to impress upon the Senate
18 committee to look at it in that regard, the
19 sacredness of having the freedom of speech or
20 having the freedom of religion to practice your
21 religion, the sacredness and the sanctity of that
22 tentative law has to be equal to what we're trying
23 to accomplish with the NAGPRA law.

24 And Sandra Murkowski, she raised a question -
25 Sandra Murkowski from Alaska raised a question with

1 regard to the status of corporations in Alaska,
2 Native corporations, and she spoke of it in the
3 context of the amendment of the definition of
4 Native American in the - you know, as part of the
5 law. And she brought it up during the second
6 panel, I believe it was in the second panel, the
7 Department of Interior representatives and the
8 National Museum of the American Indian
9 representatives were on that panel, and the
10 discussion was - I think, you know, being from
11 Alaska, I believe that Senator Murkowski's interest
12 is to see some level of acknowledgement of the
13 Federal government to Alaska Corporations that is
14 equal to tribal status.

15 And so in looking at the - you know, our
16 support for the technical amendment of the Native
17 American definition, what we're talking about with
18 regard to the technical amendment is to include the
19 two words "or was" after the two words "that is"
20 indigenous to the United States. So I'm not sure
21 yet how this is going to play out with regard to
22 Senator Murkowski's question and interest - and her
23 expression of her interest with respect to the
24 Alaska Corporation status in amending the
25 definition of either Native American or Indian

1 tribe. I'm not really certain yet how this is
2 going to work, but if the Senate Committee is
3 looking at the technical amendment with regard to
4 having something that they are going to be
5 agreeable to in moving forward and if these two
6 particular issues can complement one another, then
7 we'll probably see it go forward in that manner.

8 The record will remain open for two weeks from
9 June 16, and so Chairman Akaka stated that they are
10 interested in receiving testimony from interested
11 individuals with regard to the theme. And you
12 know, the three panels that were present were from
13 the Government Accountability Office, the GAO, they
14 discussed their two reports; and then the
15 Department of Interior and Smithsonian NMAI were on
16 the second panel; and then myself, Chairman Macarro
17 from Southern California, and Ted - I can't
18 remember his last name, he's - Isham, from
19 Oklahoma, the Osage Nation. We were the three
20 tribal leaders that were on the third panel.

21 And it's my hope, and I've already started
22 getting the word out to the number of tribal
23 leaders that I am acquainted with, to encourage
24 them to submit testimony or at least submit their
25 comments to the testimony by the deadline. And I

1 mean, that, I think, is what Chairman Akaka is
2 encouraging, you know, from having scheduled the
3 oversight hearing. So but that's about all I have
4 to say about the hearing.

5 ROSITA WORL: Thank you, Merv. Would you mind
6 if anybody wanted to ask questions?

7 MERVIN WRIGHT, JR.: No, I don't mind.

8 **REVIEW COMMITTEE QUESTIONS AND DISCUSSION**

9 ROSITA WORL: Okay. Do we have any questions?
10 Thank you. I think in our last Report to Congress,
11 we have - the committee has addressed 10.11, in
12 terms of the associated funerary objects. We are
13 recommending, you know, that - first, we are asking
14 that museums be - you know, look at this for Native
15 Americans and our belief systems and return those
16 with the human remains, and then we're also
17 recommending that the rule be opened up again for
18 comment and revisiting that point. And then of
19 course, in our report, we've always consistently
20 had supporting the amendment "or was" and I think
21 we may have some opportunities, you know, to look
22 at that in legislation, so we'll continue to work
23 on that.

24 So okay, thank you. Thank you, Merv. We'll
25 go ahead now to the dispute procedures and finding

1 procedures, and I will turn it over to Eric
2 Hemenway now. Eric.

3 ERIC HEMENWAY: Thank you, Rosita.

4 **ACTION ITEM: REVIEW OF THE REVIEW COMMITTEE'S**
5 **DISPUTE PROCEDURES AND FINDINGS PROCEDURES**

6 ERIC HEMENWAY: Rosita, Sonya Atalay and myself
7 were given the duty of helping develop dispute
8 procedures, and it turned into a conversation of
9 dispute procedures during the meeting and then
10 dispute procedures prior to the meeting. And with
11 the dispute procedures prior to the meeting, we
12 have the procedures that would be on the website,
13 and that would be how the tribes and the museum or
14 Federal agency would come to a dispute. But we're
15 going to focus first on what would happen during a
16 meeting.

17 One of the issues that we talked about was
18 time, and the time issue of how long does each
19 group have to present. So we would like to see
20 some type of guideline with time, maybe 60 minutes
21 or 90 minutes. Once again, these are just all
22 recommendations to be discussed. But I think a
23 hard time limit would be beneficial for all groups,
24 so we have, you know, a fair amount of time
25 distributed. And with presenters, and we know that